

**BCW, Inc., d/b/a Sunward Materials and Transport, Local Delivery and Sales Drivers, Warehousemen and Helpers, Construction, Mining, Motion Picture and Television Production, State of Arizona, Local Union No. 104, an affiliate of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner.** Case 28-RC-4905

August 27, 1991

## DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered objections and challenges to an election held January 25, 1991, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulation Election Agreement. The tally of ballots shows 113 for and 117 against the Petitioner, with 6 challenged ballots, a sufficient number to affect the results.<sup>1</sup>

The Board has reviewed the record in light of the exceptions<sup>2</sup> and briefs, has adopted the hearing officer's findings<sup>3</sup> and recommendations,<sup>4</sup> and finds that the election must be set aside and a new election held.

<sup>1</sup>The parties stipulated during the hearing that Bruce McDowell, Bruce Gerke, Paul Winter, and Edward Harvey were ineligible to vote in the election. In the absence of exceptions we adopt, pro forma, the hearing officer's recommendation to sustain the challenges to their ballots. The two remaining challenged ballots are an insufficient number to affect the results.

<sup>2</sup>In its exceptions, the Employer argues that because only two eligible voters cast ballots at the AC/DC polling site where Vivian, an employee allegedly closely identified with management, was serving as the Employer's observer, the use of Vivian as an observer could *not* have affected the outcome of the election. In support of this argument, the Employer filed an addendum to Employer's Statement of Exceptions or, in the alternative, a motion to reopen the record, seeking to include in the record certain election documents, including the voter eligibility list showing the names and numbers of voters at each of the six polling sites. Neither party moved for the introduction of these documents at the hearing. The Employer's motion is denied because the Employer has not shown that the introduction of the documents would require a different result. See *Mid-Continent Spring Co.*, 273 NLRB 884 (1985) (Board set aside election where employee closely identified with management served as the company's observer, notwithstanding the evidence presented which demonstrated that such conduct did not result in any prejudice).

We find that the election must be set aside and the Employer's motion to reopen the record denied because, even if the facts were as represented by the Employer, the Employer has not established that the outcome of the election *could* not have been affected by the use of Vivian as an observer. The tally of ballots showed 117 against and 113 for the Union, with 6 challenged ballots of which 4 were agreed to be ineligible. Taking into account the two unresolved challenged ballots and the two potentially coerced ballots cast at the AC/DC site, the outcome of the election *could* have been affected by Vivian's serving as the Employer's observer.

<sup>3</sup>The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

<sup>4</sup>In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule the Petitioner's Objection 1 and approve the Petitioner's withdrawal of Objection 2.

The Petitioner objected to the Employer's use of Ken Vivian as its election observer at the AC/DC polling site on the basis that he is a supervisor. Although the hearing officer found that Vivian is not a 2(11) supervisor or a managerial employee, the hearing officer concluded that Vivian could reasonably be viewed by the employees as closely identified with management and, therefore, recommended that the Board set aside the election. For the reasons set forth below, we agree with the hearing officer.

The Employer produces concrete building products for the construction industry, and delivers its products to the customer by ready-mix trucks. The Employer has six locations and approximately 400 employees in the Phoenix, Arizona area.

Vivian was hired in May 1987 by the Employer as a mechanic. In September 1988, he was transferred to the personnel section as a training administrator. His title was later changed to compliance/training specialist because he was given additional compliance duties.

Vivian conducts monthly on-site safety and training sessions for the employees, the topics of which are determined by management. Vivian prepares the presentation, often including the use of a VCR and television, lecturing, passing out published information, and other visual aids. At each training session, Vivian asks the employees to sign an attendance sheet so that he can monitor the Employer's compliance with Federal training requirements.

Vivian is also responsible for training new employees on the operation of various equipment and making sure the employees wear the proper safety equipment. At his orientation meetings, Vivian lectures new employees on the Employer's safety policies, passes out safety information and employee handbooks, and sometimes invites outside speakers to supplement his presentations.

With regard to his compliance duties, Vivian reviews the drivers' logs of hours on the road to ensure that they are within the Federal and state regulations. He also monitors the employees' traffic records and, if he finds that an employee has failed to report an incident, he contacts the driver's supervisor about getting a report. Vivian maintains a file on each employee containing information on their driving status.

The drivers were aware that Vivian occasionally monitored their speed by using a radar gun. On such occasions, Vivian was usually accompanied by a foreman. Vivian testified that he noted the names, speed, and location of speeding drivers, but took no disciplinary actions against them. Employee Steven Russell testified that he heard at a safety meeting (from either Vivian or his foreman) that employees working out of his plant had been caught speeding, although he did not know whether any action was taken against these speeders.

Since September 1988, Vivian has been very active and visible in the hiring process. He greets applicants, introduces himself as the training administrator, answers preliminary questions, checks employment applications for completeness, and schedules interviews with foremen when told to do so by the manager of personnel services, Michael McGuckin. Later in the hiring process, he administers written drivers' tests, corrects the tests and returns them to the employees to look over, tells applicants where to go for their physicals and drug tests, issues safety gear and instructs on its use, informs the employees of their pay rate, and, if hired, tells them when and where to report to work. The other employees who work in the personnel department earn between \$13,000 and \$19,000 per year. Vivian was earning approximately \$27,000 at the time of the election.

During the Petitioner's organizational drive, the Employer held election campaign meetings with unit employees at various plants. Vivian attended three of these meetings and only parts of others. At the meetings, Vivian sat in the front of the room by the television facing the employees, next to and in line with the managers who addressed the employees. The employees sat around a table facing the managers and Vivian. Although Vivian did not make any campaign speeches, he did wear a "Vote No" button, as did the managers and some of the employees present.

Vivian has his own office at the Employer's headquarters building where he stores his training materials and meets with employees. He also drives a company-owned truck.

The hearing officer concluded that Vivian could reasonably be viewed by the employees as closely identified with management and, therefore, his serving as the Employer's observer interfered with the laboratory conditions. In so finding, the hearing officer, in agreement with our dissenting colleague, did not find *Mid-Continent Spring Co.*, 273 NLRB 884 (1985), to be controlling because the employee found closely identified with management there was the personnel manager. Rather, the hearing officer relied on *B-P Custom Building Products*, 251 NLRB 1337 (1980), in finding that Vivian would be viewed by employees as a person closely identified with management.

Contrary to our dissenting colleague, we agree with the hearing officer that, under all the circumstances, the Employer had placed Vivian in a position in which he could reasonably be viewed by employees as closely identified with management. It is established Board policy that persons closely identified with management may not act as employer observers. See *Peabody Engineering Co.*, 95 NLRB 952, 953 (1951). Accordingly, we find that the Employer's use of Vivian as an observer constitutes objectionable conduct and, therefore,

we direct that the election be set aside and a new election held.

[Direction of Second Election omitted from publication.]

MEMBER OVIATT, dissenting in part.

Contrary to my colleagues, I would overrule Petitioner's Objection 3 and certify the election results. In Objection 3, the Petitioner claimed that the Employer tainted the election by using an alleged supervisor, Ken Vivian, as its election observer at one of the several polling places. At the preelection conference, the Petitioner's organizer asked the Employer representatives whether there were supervisors on the list of observers. The Employer answered that there were none. The Hearing Officer found, and my colleagues and I agree, that Vivian is not a supervisor or a managerial employee. The hearing officer went beyond the objection, however, and concluded that the election should be set aside because Vivian could be viewed by employees as closely identified with management.

*Mid-Continent Spring Co.*<sup>1</sup> cited by the majority is in my view inapposite and neither compels nor warrants my colleagues' result here. In that case, a panel majority reversed the hearing officer and set the election aside based on the employer's selecting K. Marsh as its observer in the election. The facts listed by the Board and the hearing officer in that case showed that the employees (and at least one management official) considered Marsh the "personnel manager"; she was a member of the management negotiating team; regularly attended supervisory meetings; represented the employer at the first step of the grievance procedure; sat in on third step grievance meetings; and participated in employees' job evaluations. At the preelection conference in that case, the union specifically objected to Marsh's serving as an observer on the ground that she was the employer's personnel manager. Here, Ken Vivian is a compliance and training specialist who conducts safety and training meetings for employees at the various jobsites. He is also responsible for training new employees on the operation of various equipment, and making sure that employees wear proper safety equipment. This case is completely different than the situation presented in *Mid-Continental Spring*. None of the factors cited in that case are present here. Vivian's actual status here does not in my view support setting the election aside. Indeed, as the hearing officer specifically found, Vivian "clearly does not possess any of the indicia of a supervisor. . . . nor does he meet any of the criteria for a managerial employee . . . ." Accordingly, I would overrule Petitioner's Objection 3.

<sup>1</sup> 273 NLRB 884 (1985).